CORPORATE SURETYSHIP AND INSURANCE LAW.—Between a surety's undertaking and an insurer's, each being designed to protect against a specified peril, there is a strong resemblance. Each is accompanied by the right of subrogation,[1] and the surety's release if the principal contract is altered[2] finds its counterpart in insurance law in the doctrine of deviation[3] and in the defense of increase of risk.[4] Consequently in cases of companies doing a general business of indemnifying against loss through the default of others the applicability of suretyship defences is often in question, for in such cases the resemblance above mentioned becomes most striking.

Though a surety, strictly speaking, is a co-obligor with the principal so far as the creditor is concerned, the term is commonly used to include guarantors, whose agreement is collateral to the principal obligation, and distinct from though dependent on it.[5] Of the two, the latter more closely resemble an insurer. Yet there is a distinction between a contract assuming responsibility for the performance of another's obligation, and an undertaking to indemnify if the promisee suffers loss through a third person's default. The latter is an obligation of indemnity merely, original and independent of the one guaranteed,[6] and hence not within the Statute of Frauds,[7] liability under it being fixed only when the party indemnified is actually a loser; whereas one who has assumed responsibility for another's debt, that is, has agreed to pay, is at once liable on default at maturity.[8] Again, a guarantor has a right of indemnity against his defaulting principal on an implied assumpsit,[9] which, for want of privity, no mere indemnitor could enjoy. Accordingly, to distinguish a suretyship contract from one of indemnity, the question is, Did the promisor agree to become responsible for the debt of another, or only to reimburse his promisee in case of loss? And since an insurer is an indemnitor,[10] we can go thus far in distinguishing him from a guarantor. But it seems impossible to go further in this direction, as obligations of indemnity may more nearly resemble guaranties than insurance contracts; there is no sharp line between them.[11] Accordingly in a given case facts and surrounding circumstances must determine whether a surety has assumed an insurer's

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[1]Orrick *v.* Durham (1883) 79 Mo. 174; Begein *v.* Brehm (1889) 123 Ind. 160; Packham *v.* Germ. Fire Ins. Co. (1900) 91 Md. 515; West of England Fire Ins. Co. *v.* Isaacs L. R. [1897] 1 Q. B. 226.

[2]McGrath *v.* Clark (1874) 56 N. Y. 34.

[3]Snyder *v.* Atlantic Mut. Ins. Co. (1884) 95 N. Y. 196; Richards, Insurance, (3rd ed.) § 186.

[4]Hoffecker *v.* New Castle County Mut. Ins. Co. (Del. 1875) 5 Hous. 101.

[5]Courtis *v.* Dennis (Mass. 1844) 7 Met. 510, 518; Kearnes *v.* Montgomery (1870) 4 W. Va. 29.

[6]Anderson *v.* Spence (1880) 72 Ind. 315; 1 Brandt, Suretyship and Guaranty, (3rd ed.) § 5.

[7]Anderson *v.* Spence *supra.*

[8]Wicker *v.* Hoppock (1867) 6 Wall. 94.

[9]Rice *v.* Southgate (Mass. 1860) 16 Gray 142; *In re* Stout (1900) 109 Fed. 794; Barth *v.* Graf (1898) 101 Wis. 27.

[10]Dane *v.* Mortgage Ins. Corp. Lim. L. R. [1894] 1 Q. B. 54; Richards, Insurance, (3rd ed.) § 24 and note.

[11]Frost, Guaranty Insurance, 14.

liability or a surety's, unless it be the policy of the law to classify generally as insurers those who engage for profit in the business of protecting others against loss through the default of third persons.

Such divergences from the common law as the law of insurance has taken seem to result not from legal principles, but from the exigencies of the situation. The doctrines of waiver[12] and of warranty,[13] for example, are clearly founded in considerations of equity and policy; that is, these two very distinctive doctrines of insurance law are due to no essential peculiarity of the contract, but to extraneous reasons. It would seem that the policy which differentiated insurance law from the law of contract might well justify the treatment of surety companies in a manner different from individual sureties, and the more so as the contract of the former is usually one of indemnity.[14] The guaranty insurance, or suretyship business, is conducted along precisely the same lines as the insurance business,[15] with its premiums, carefully prepared contracts, numerous conditions, and warranties. Accordingly the courts have regarded guaranty and surety companies rather as insurers than as sureties.[17]

This is illustrated in the case of *United States* v. *Lynch* (1912) 192 Fed. 364, where the defendant surety company urged that its contract was to be construed strictly in its favor because of the rule that a surety is a favorite of the law.[18] In accordance with authority[19] the court rejected this claim, and, it is submitted, properly; for this rule of suretyship rests on no essential characteristic of the surety's contract, but on grounds of equity and policy.[20] The surety's undertaking is usually for accomodation—an unrequited act of friendship. While the principal would be liable independently of his contract upon a *quantum meruit,* the surety's obligation is derived from his promise alone.[21] His moral obligation is different from that of the ordinary obligor.[22] Quite the reverse is true of the surety company,[23] as has been pointed out. Accordingly it seems right that it should be in a different position before the courts from an individual surety,

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[12]Richards, Insurance, (3rd ed.) § 126.

[13]Richards, Insurance, (3rd ed.) § 102.

[14]See 1 Brandt, Suretyship and Guaranty, (3rd ed.) § 5.

[15]See Guaranty Co. *v.* Wood (1895) 68 Fed. 529, for a notion of the business methods of these companies.

[16]See Richards, Insurance, (3rd ed.) § 469; Stearns, Suretyship, 446.

[17]Bank of Tarboro *v.* Fidel. and Dep. Co. (1901) 128 N. C. 366; Dane *v.* Mortgage Ins. Corp. Lim. *supra;* see Eickhoff *v.* Fidelity and Cas. Co. (1898) 74 Minn. 139; People *v.* Rose (1898) 174 Ill. 310; Robertson *v.* U. S. Cr. System Co. (1894) 57 N. J. L. 12; Wheeler *v.* Real Est. Tit. Ins. Co. (1894) 160 Pa. 408.

[18]Ulster Co. Sav. Inst. *v.* Young (1899) 161 N. Y. 23; Miller *v.* Stewart (1824) 9 Wheat. 680.

[19]U. S. *v.* Nat. Surety Co. (1899) 92 Fed. 549; see City Trust etc. Co. *v.* Lee (1903) 204 Ill. 69.

[20]1 Brandt, Suretyship and Guaranty, (3rd ed.) § 107.

[21]*Ibid.*

[22]Pickersgill *v.* Lahens (1872) 15 Wall. 140; Van Derveer *v.* Wright (N. Y. 1849) 6 Barb. 547; see White *v.* Moore (1885) 23 S. C. 456.

[23]See 1 Brandt, Suretyship and Guaranty, (3rd ed.) 236 n. 69.

and that, far from applying the rule that a surety's obligation is *"strictissimi juris"*, the courts should have subjected him to the opposite rule of insurance law, that the contract is to be construed strictly against the insurer.[24]

STOCKHOLDERS' INDIVIDUAL LIABILITY AND THE CONFLICT OF LAWS.—The assumption that the common law relation between the fictional corporate entity and its stockholders and creditors is substantially a contractual one,[1] though not free from inconsistencies,[2] is nevertheless very close to the truth, and it is well established that the resulting obligations are enforcible, under principles of comity, beyond the borders of the state of incorporation.[3] The law of the domicil, it is said, fixes the rights and liabilities of the parties to the corporate agreement. But although there is secured by incorporation a limited liability in dealings with strangers, nevertheless this liability remains inherently consensual whether the extent of the limitation granted by the charter be very considerable,[4] as it usually is, or, as in the case of a so-called unlimited liability corporation, practically insignificant.[5] In either case, the nature of the liability is the same, since it simply consists of what remains after the scope of the limitation has been determined. It seems further that the quantum of exemption conferred, depending as it must upon the legislative intent, may be defined and fixed by the charter or enabling act interpreted either by themselves or in connection with any existing provision of the statutory or organic law.[6] This conclusion seems logically unassailable, for a general statutory or constitutional provision, as an expression of the legislative will, cannot be less effectual than a special charter or enabling act. Neither one is either clearer or less clear than the other, and accordingly the operation of a statute of the domicil providing for unusual individual liability, is simply to confer upon stockholders, in corporations subsequently formed, a slighter exemption from liability than they would otherwise have had. Such appears to be the ultimate significance of the familiar statement that the general law of the domicil enters into the corporate charter; but in spite of the universal

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[24]Walker *v.* Holtzclaw (1899) 57 S. C. 459; Tebbetts *v.* Merc. Cr. Guar. Co. (1896) 73 Fed. 95; Pittsburgh etc. Co. *v.* Keokuk etc. Co. (1901) 107 Fed. 781; Bank of Tarboro *v.* Fidel. and Dep. Co. *supra;* Guarantee Co. *v.* Mechanics' Sav. and Tr. Co. (1896) 80 Fed. 766; American Surety Co. *v.* Pauly (1898) 170 U. S. 133, 144.

[1]See 1 Morawetz, Private Corporations, (2nd ed.) 24; Pinney *v.* Nelson (1901) 183 U. S. 144.

[2]This relation cannot be considered strictly contractual, for it has attributes which are not explainable on any theory of contract. See Hohfeld, Stockholders' Individual Liability, 9 COLUMBIA LAW REVIEW 285, 309 *et seq.;* Crippen *v.* Laighton (1899) 69 N. H. 540; Hancock Bank *v.* Farnum (1898) 20 R. I. 466, reversed (1900) 176 U. S. 640.

[3]Bank of Augusta *v.* Earle (1839) 38 U. S. 519.

[4]Latimer *v.* State Bank (1897) 102 Ia. 162.

[5]Corning *v.* McCullough (1847) 1 N. Y. 47; see Hohfeld, *op. cit.,* 305, n. 48.

[6]Whitman *v.* Bank (1900) 176 U. S. 559; Starkweather *v.* Am. Bible Society (1874) 72 Ill. 50.